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LEGAL ETHICS

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WHO YOU GONNA CALL? (Part 2) *California Joan searches for ethical means of contacting employees of an adverse party corporation*

By ELLEN R. PECK
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Meryl Terpitute rushed into California Joan's office, flopped down on a chair, followed closely by an unknown woman hobbling to keep up. "Partner!" he greeted Cali, "Meet our client, Sally Slide, an unfortunate victim of a slip and fall from spilled squash in Safemarket. We want to interview Safemarket produce employees to verify Safemarket's negligence and to support our probable cause to file an action against Safemarket for Sally's damages for the slip and fall. Can I send my investigator to interview Safemarket's employees?"

"Are any of the employees represented by Safemarket's counsel?" asked Cali.

"I don't know. We have not yet made any contact with Safemarket's management, claims agents or lawyers because I want to get the evidence before they have a chance to zip the lips of their employees," replied Meryl.

"As you recall, last month we discussed that rule 2-100, Rules of Professional Conduct of the State Bar of California ("rule 2-100"), prohibits your contact with opposing parties known by you to be represented by counsel concerning the subject matter of the representation. In the case of an organization, which can only speak through its human constituents, a 'represented party' means members of the 'control group,' corporate 'managing-speaking agents' or employees whose actions or omissions could be binding on or imputed to the organization," Cali recited. (*Snider v. Superior Court* (Quantum Productions Inc.) (2003) 113 Cal.App. 4th 1187, 7 Cal.Rptr.3d 119, 127-130, 132. [*Snider*].)"

"Well, I am instructing my investigator just to interview Safemarket employees who are not managers or in the control group. But I would not know whether or not the employee's actions or omissions could be binding on or imputed to the organization without having some initial questioning. Do I risk a violation?" queried Meryl.

"No, in order to violate rule 2-100 you must have actual knowledge that the Safemarket employees are represented by counsel or that by operation of law they are covered by rule 2-100. We'll talk later about ways to determine whether an employee is a covered employee." (*Snider*, supra, 7 Cal.Rptr.3d at p. 138-140; *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 1403, 58 Cal.Rptr.2d 178 (*Jorgensen*); *Truitt v. Superior Court* (1997) 59 Cal.App.4th 1183, 69 Cal. Rptr.2d 558.)

Meryl was still anxious. "Like most big corporations, Safemarket must have an in-house corporate counsel or outside counsel that regularly represent them. Don't I have some suspicion that the employees are represented by counsel?"

Cali shook her head. "No. *Jorgensen* held that rule 2-100 does not apply either where a lawyer 'should have known' that a corporate employee was or would be represented by corporate counsel or where a lawyer knew that a corporation employed in-house counsel, unless the lawyer knows in fact that such house counsel represents the person being interviewed when that interview is conducted." (*Jorgensen*, supra, at p. 1401-1402.)

"Since Sally has to leave, I'll call you later about instructions to the investigator," Meryl said, helping Sally out of Cali's office as the phone was ringing.

Cali's other partner, Organization "Oggie" Mann's agitated voice blasted from the telephone handle. A sexual harassment case had recently been filed by Paul Plaintiff against Oggie's clients, BigCo, President and Supervisor. Oggie had filed an answer on behalf of all defendants.

"Knowing that I represented BigCo, Plaintiff's lawyer directly interviewed a number of BigCo employees in the department where Paul worked without my knowledge or permission. Hasn't he violated rule 2-100, warranting sanctions?" Oggie asked.

Oggie acknowledged that none of the interviewed employees were members of the control group, corporate 'managing-speaking agents,' or employees whose actions or omissions could be binding on or imputed to the organization. He also acknowledged that he had not sent a letter to the Plaintiff's counsel advising him that Oggie represented corporate employees.

"Under these circumstances, I do not think that rule 2-100 has been violated. Even after the commencement of litigation, rule 2-100 requires actual knowledge, not constructive knowledge of representation. Ex parte contacts with employees are not prohibited after litigation has been filed unless a lawyer has been advised that opposing counsel represents the employees or unless they are covered by rule 2-100," Cali opined. (*Truitt*, supra, at p. 1190.)

Oggie suggested, "But after an action has been filed, I think Plaintiff's counsel has a duty to ask me if he could interview employees. If we can not reach agreement, Plaintiff's counsel should then submit the matter for court determination."

Cali countered, "Unfortunately, *Snider* held that rule 2-100 does not require advance permission of opposing counsel or an order from the court prior to contacting employees that are not within the scope of 2-100. (*Snider*, supra, 7 Cal.Rptr.3d at p. 139.)

"How can corporate counsel be proactive to protect their client corporations and their employees?" Oggie asked.

"One court suggested that if corporations want to prevent opposing counsel interviewing their employees, they can instruct their employees not to speak to claimant's investigators or they can send the other party a letter warning that their employees are represented by counsel in the matter, and may not be interviewed under rule 2-100 without the consent of counsel," (*Jorgensen*, supra, at p. 1403, 58 Cal.Rptr.2d 178) Cali responded.

Cali added, "Sending a letter to opposing counsel stating that corporate counsel concurrently represents all employees and that no contact may be made without the permission of corporate counsel brings all employees within rule 2-100. However, it may also pose some ethical problems:

- First, a lawyer that represents an organization must conform the representation to the concept that the lawyer represents the organization and does not represent constituents personally. (Rule 3-600(A); *Meehan v. Hopps* (1956) 144 Cal.App12d 284, 290, 301 P.2d 10.) A lawyer may represent other constituents concurrently so long as the lawyer complies with conflict of interest rules. (Rule 3-600(E). Moreover, if irreconcilable conflicts develop, the lawyer may be required to withdraw or be disqualified from representing all parties.

- Second, formation of the attorney-client relationship between counsel and organization employees should occur before notifying opposing counsel of the representation. This will ensure that employees are aware that they are represented by corporate counsel on a matter and can warn opposing counsel that they are represented. It will also prevent charges that corporate counsel falsely represented that he or she had an attorney-client relationship with corporate employees when no such relationship had yet been formed. (See e.g., Bus. & Prof. Code, §6106 *Snider*, supra, 7 Cal.Rptr. 3d at p. 139.)

- Third, corporate counsel should state the nature and extent of corporate constituent representation very precisely. In *Koo v. Rubio's Restaurants Inc.* (2003)109 Cal.App.4th 719, 135 Cal.Rptr.2d 415, a lawyer defending a corporation in a class action case regarding overtime wages for managers represented to the court that his firm represented both the corporation and its managers to put opposing counsel on notice that the corporation's managerial agents were "represented parties" to invoke the protections of rule 2-100.

Class action lawyers promptly sought to disqualify corporate counsel for a conflict of interest in representation of actually adverse parties. Corporate counsel clarified that he represented the managers in their representative capacity only, not in their individual capacity.

Fortunately, disqualification was reversed since (1) corporate counsel's representation to the court, standing alone, did not create an attorney-client relationship with the managers individually; (2) in representing a corporation, corporate counsel does represent corporate managers in their representative capacities; and (3) the statement caused no adverse effect upon the litigation. (*Koo*, supra, 135 Cal.Rptr.2d 415, 423.)

"When corporate managers are potential class members, can I block ex parte contact with managers by invoking rule 2-100?" Oggie asked hopefully.

Cali pointed out that this issue is unsettled. "There is no California case expressly stating that rule 2-100 is applicable to prevent ex parte contact with a corporate defendant's managers in a class action where the same managers are potential class members. Corporate defendants can and have invoked rule 2-100, claiming that class counsel cannot contact potential class members who are in this context. (See McClellan, *Restrictions on Attorney Communications with Potential Class Members* (2002) 44-Jul. Orange County Law. 10, 11.)

"On the other hand, *Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 135 Cal.Rptr.2d 90, disapproves of restrictions on pre-certification contact with potential class members, based on freedom of speech concerns, although it does leave room for protective orders in appropriate circumstances. Since Parris did not consider the application of rule 2-100, it may not be binding." (*Koo*, supra, 135 Cal.Rptr.2d at p.424, fn. 5.)

Cali suggested proactive measures that organizations and their counsel can take to protect against disclosure of privileged information:

1. Informing employees generally of the organization's concerns or policies about disclosure of information to outside counsel representing adversaries;
2. Once an incident has occurred that may give rise to a claim or action, reminding employees of the organization's concerns or policies about disclosure of information; and
3. Once a dispute or claim has arisen, informing affected employees and/or opposing counsel of the identity of the organization's counsel and the organization's position concerning communications between employees and opposing counsel.

Shortly after Oggie hung up, Meryl returned to Cali's office. "I represent Carl Consultant in a breach of contract action against SmallCo. SmallCo has brought a summary judgment motion against Carl which includes a declaration from Ella Employee, who is a sales associate. Carl and Ella had been good friends when Carl did consulting work for SmallCo. Yesterday, out of the blue, she called him. She apologized for her declaration, said that SmallCo's counsel made her rewrite her declaration several times and 'told her what to say.' Since she has made the contact, can I call her and find out more about how SmallCo's counsel 'told her what to say'?" Meryl asked.

"Meryl, you should not call or have further contact with Ella regarding her declaration. If her job status does not render her an employee who is deemed to be a represented party covered by rule 2-100, she has talked to SmallCo's counsel about the subject matter of dispute. If you question her about her conversations with SmallCo's counsel, you could be invading SmallCo's attorney-client privilege, which is a second and independent basis for sanctions," Cali warned. (*Snider*, supra, 7 Cal. Rptr.3d at pp. 136-137.)

Meryl blanched and asked, "Am I subject to any sanction for her contact with my client?"

"No, Meryl. In fact, in your opposition to the summary judgment motion, you can disclose and use the information obtained by contact initiated by a corporate employee to your client without your involvement. Ella's contact with your client does not establish violation of the attorney-client privilege by you.

"Moreover, it would not be a violation of rule 2-100, since the rule does not prevent the parties themselves from communicating about the subject matter of the representation." (*Snider*, supra, 7 Cal. Rptr.3d at p. 136.)

Meryl then sought Cali's advice about Sally Slide's case against SafeMarket. "In contacting corporate employees, I have two challenges: first to ensure that the employees are not within the scope of rule 2-100 and second, that I am not violating the corporation's attorney-client privilege. How can I comply with my ethical obligations in contacting corporate employees?"

Cali suggested the following risk management steps:

1. Get information before you make any contact with corporate employees.

If a lawyer has some reason to believe that an employee of a represented organization might be covered by rule 2-100, the lawyer should conduct discovery or communicate with opposing counsel concerning the employee's status before contacting the employee. As the *Snider* court warned:

"A failure to do so may, along with other facts, constitute circumstantial evidence that an attorney had actual knowledge that an employee fell within the scope of rule 2-100. It might further provide support for a more drastic sanction if a violation of rule 2-100 is found." (*Snider*, supra, 7 Cal.Rptr.3d at p. 139.)

2. Train the questioner concerning categories of employees that are within the scope of rule 2-100.
3. In contacting employees of a represented organization, ask foundational questions before asking for substantive information.

At a minimum, the foundational questions should be:

- What is the employee's status within an organization? If there is any question that the employee might be within the scope of rule 2-100, do not have any further

ex parte contact without further discovery or discussion with the organization's counsel to clarify the employee's status or the organization's counsel's permission.

■ Is the employee represented by counsel? If the employee says yes, you can find out the identity of counsel and then should terminate the discussion. Further contact without the permission of the employee's counsel would then be a violation of rule 2-100 since you would have actual knowledge that the employee is represented by counsel on the subject matter of the representation.

■ Has the employee spoken to the organization's counsel concerning the matter at issue? If the employee has spoken to the organization's counsel, the employee may be in possession of privileged information and the communication should be terminated. (*Snider*, supra, 7 Cal.Rptr.3d at p. 137.)

As Meryl left the office, Cali mused that if both Meryl and Oggie exercised caution and prudence, both sides will avoid much of the potential for violations of rule 2-100 or breach of attorney-client relationships. (*Snider*, supra, 7 Cal. Rptr.3d at pp. 137-138.)

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Test — Legal Ethics

1 Hour MCLE Credit

1. Rule 2-100 does not apply to pre-litigation matters.
2. Before litigation has commenced, lawyers may freely contact any corporate employee and interview them about the subject matter of a dispute without the permission of the corporation's counsel.
3. A lawyer who has ex parte contact with an organization's employees with actual knowledge that corporate employees are represented by counsel or that by operation of law they are covered by rule 2-100, violates rule 2-100.
4. A lawyer who has ex parte contact with an organization's employees with constructive knowledge that corporate employees could be represented by counsel or that by operation of law they are covered by rule 2-100, violates rule 2-100.
5. A lawyer who has ex parte contact with an organization's employees with knowledge that the organization has access to in-house counsel and has been represented in the past by such counsel violates rule 2-100.
6. After litigation has commenced and a lawyer knows that an organization is represented by counsel, a lawyer must obtain the permission of the organization's counsel before making ex parte contact with the organization's employees who have not yet been designated as clients of the organization's counsel.
7. In litigation, rule 2-100 does not require an order from the court prior to contacting employees who are not within the scope of 2-100.
8. If corporations want to prevent opposing counsel from interviewing their employees, they can instruct their employees not to speak to claimant's investigators or they can send the other party a letter warning that their employees are represented by counsel in the matter, and may not be interviewed under rule 2-100 without the consent of counsel.
9. Corporate counsel sending a letter to opposing counsel stating that corporate counsel concurrently represents all employees and that no contact may be made can pose some ethical problems.
10. A lawyer representing an organization also represents the officers personally by operation of law.
11. A corporation's lawyer who represents to opposing counsel that he or she represents all corporate employees without forming an attorney-client relationship between corporate counsel and organization employees may be engaging in misrepresentation.
12. In a class action setting where corporate managers may be potential class members, corporate counsel may seek to protect all managers from ex parte interview by class counsel by asserting that they represent the managers personally.
13. It is well settled that in a class action where corporate managers may be potential class members, corporate counsel may invoke rule 2-100 to prevent class counsel's ex parte contact with the managers.
14. Organizations and their counsel should take proactive measures to protect against disclosure of privileged information by corporate employees.
15. Once an incident has occurred that may give rise to a claim or action, one method of protecting corporate privileged information is to advise or remind employees of the organization's concerns or policies about disclosure of information to opposing counsel.
16. A lawyer who learns that a corporate employee, not covered by rule 2-100, has spoken with corporate counsel about the subject matter of the dispute should terminate ex parte contact immediately.
17. A lawyer stated in his declaration that an employee of an opposing party corporation contacted his client, Plaintiff, and told him that corporate counsel made her rewrite her declaration several times and "told her what to say." The employee was not covered by rule 2-100. The lawyer's declaration statement is a violation of the corporate attorney-client privilege and therefore subject to sanction.

18. A lawyer stated in his declaration that an employee of an opposing party corporation contacted his client, Plaintiff, and told him that corporate counsel made her rewrite her declaration several times and "told her what to say." In this instance, the employee could have been covered by rule 2-100. The lawyer's declaration statement demonstrates a violation of rule 2-100.

19. In order to prevent risk of violating rule 2-100, if a lawyer has some reason to believe that an employee of a represented organization might be covered by rule 2-100, the lawyer should conduct discovery or communicate with opposing counsel concerning the employee's status before contacting the employee.

20. In conducting an ex parte contact with an opposing party-organization's employee, not covered by rule 2-100, if the employee has spoken to the organization's counsel, the contact may go forward.

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MCLE ON THE WEB

TEST #45 — Who Are You Gonna Call? (Part 2)

1 HOUR CREDIT LEGAL ETHICS

- Print the answer form only and answer the test questions.
- Mail only form and check for \$20 to:

MCLE ON THE WEB — CBJ
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Name

Law Firm/Organization

Address

State/Zip

State Bar Number (Required)

1. True____ False____
2. True____ False____
3. True____ False____
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